IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2590 OF 2002

Vashu Gokuldas Kukreja
and another ... Applicants

versus

Meena Vashu Kukreja & anr. ... Respondents

Shri M.S.Mohite for applicants.

Shri R.M.Agrawal for respondent no.1.

Shri S.S.Pednekar, APP for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 09.12.2005

DATE OF PRONOUNCING THE JUDGEMENT : 23.12.2005

JUDGEMENT :-

1. This application under section 482 of the Code of Criminal Procedure is by applicants who are accused in Criminal Case No.667 of 2001 on the file of Judicial Magistrate, First Class, Ulhasnagar. To be precise, they are accused nos.1, 2 and 8.

2. The challenge is to an order of learned Magistrate issuing process against the applicants after recording his prima facie satisfaction that the complaint discloses offence punishable under sections 467, 498-A, 497, 494, 496, 506 R/W 34 IPC.. The order of the learned Magistrate to this effect passed on 13th September 2001 stands partly confirmed by the order of Second Additional District and Sessions Judge, Kalyan dated 25th June 2002 in Criminal Revision Application No.74 of 2001. The Sessions Judge has partly allowed the application and has directed that the order of the learned Magistrate is confirmed only qua offence alleged u/s 494 and not the other offences alleged in the complaint. Further, the process to be issued duly against the applicants herein and not other accused. It is this order which is under challenge in this application.

3. Thus, the arguments are restricted to the order issuing process insofar as offence punishable under section 494 of the IPC.. In other words, the only contention raised before me is that the complaint does not disclose an offence punishable under this section.

4. For appreciating this contention, it would be necessary to refer to the complaint which is filed by first respondent. The grievance of the first respondent in this complaint is that she is legally wedded wife of the first applicant herein. Their marriage was solemnized as per Hindu rites and rituals on 25th February 1982. It is her grievance that the first applicant had always demonstrated his unhappiness with the marriage. On some flimsy grounds he often drove her from the house. It is alleged that the first applicant and the second applicant herein got married on 10th February 1997. The complaint alleges that the second marriage was solemnized when first respondent's marriage with the first applicant herein, was subsisting and, therefore, an offence punishable under section 494 of IPC is made out. Apart from this, the complaint alleges several other offences averments pertaining to which need not be referred to for disposing off the present petition.

5. The precise submission of Shri Mohite is that first respondent-complainant left the matrimonial home on 5th May 1992. The first respondent thereafter applied for dissolution of the marriage with the original complainant and in

that behalf instituted a Matrimonial Petition No.221/1995 in the Civil Court. Upon this petition, summons was served on the original complainant-wife. However, she did not remain present to contest the proceedings. The Civil Court, therefore, passed an ex-parte decree of dissolution of the marriage on 1st February 1996. According to Shri Mohite, this was based on the ground of desertion. After waiting for one year, on 10th February 1997 the first applicant married second applicant herein. According to Shri Mohite, the ingredients of Section 494 IPC postulate second marriage during subsistence of the earlier marriage. The relationship of husband and wife as far as first marriage is concerned, should subsist on the date of alleged second marriage. If the relationship is not subsisting, as is in the present case, then it cannot be said that the first applicant's act of marrying second applicant is in any manner punishable u/s 494 of IPC.. He states that first respondent's complaint has been filed on 24th July 2001 after a considerable delay and alleging an offence of Bigamy. That the marriage is not bigamous, is clear from what is urged above. In these circumstances, the present complaint does not disclose an offence punishable under section

494 of IPC..

6. Shri Mohite submits that the ex-parte decree was set aside by the Appellate Court on 28th January 2002 i.e. much after filing of the complaint. The appeal stands allowed and the ex-parte decree was set aside. The matrimonial petition filed by the first applicant against the original complainant in the Civil Court stood revived for being disposed of on merits and in accordance with law. However, this subsequent act or judicial order can have no bearing on the facts and circumstances set out in the criminal complaint. Therefore, this is a fit case where this Court must exercise it’s inherent powers and more particularly to prevent the abuse of the process of the Court. Even otherwise, they should be exercised to secure ends of justice. Shri Mohite in support of his contention places strong reliance upon a decision of Hon’ble Supreme Court reported in 2002-All.Mah.Reporter (Cri.)-912.

7. On the other hand, Shri Agarwal appearing for the first respondent states that there is absolutely no merit in the contentions of Shri Mohite. In the submission of Shri Agarwal, the

matter is absolutely clear. He submits that today this Court cannot presume that no offence u/s 494 is disclosed from the averments in the complaint. He submits that the effect of the orders passed by the Civil Court, more particularly that of the Appellate Court, has to be gone into and if their true effect is that the relationship of the original complainant and the applicant no.1 as husband and wife subsists in law, then the act of marrying a second time during the subsistence of first marriage, prima facie, discloses commission of an offence u/s 494 of IPC.. He submits that ex-parte decree being set aside or in any event being an out-come of fraud, this Court should not exercise its inherent powers as that would enable the applicants to take advantage of their own wrong. He submits that mens-rea is clearly established. These facts are unclear and hazy. They need further probe and scrutiny. Therefore, interference at this stage is impermissible in law.

8. The learned counsel then invited my attention to paragraphs 4 to 6 of the affidavit filed in reply to this petition on 21st November 2005 and submits that the matrimonial petition upon

remand, was dismissed by the learned Civil Judge, Senior Division, Kalyan. In the petition a counter claim for restitution of the conjugal rights was filed. The said counter claim invoked Section 9 of the Hindu Marriage Act, 1955. The Trial Court directed, after allowing the counter claim, that the applicant no.1 should resume cohabitation. Similarly, the applicants filed Marriage Petition No.212 of 2001 in the Court of learned Civil Judge, Senior Division, Kalyan for a declaration that their marriage is legal, valid and subsisting. That petition is dismissed by judgement and order dated 26th October 2004. Thus, the relationship of husband and wife between the applicant no.1 and the first respondent was always subsisting and during subsistence of such relationship, the second marriage was illegal and void.

9. After hearing Shri Mohite and Shri Agarwal, in my view, in the peculiar facts of this case it will not be proper to interfere at this stage. More particularly, when nothing has been placed on record to rebut the above statements on affidavit. There is much substance in the contention of Shri Agarwal that the facts being peculiar and unclear it will be desirable that

the Trial Court applies its mind after entire material is produced before it at the trial. It would then hold whether an offence u/s 494 of IPC is made out by respondent no.1 or not.

10. I am of the view that any definite finding about the validity of the marriage between the applicant nos.1 and 2, at this stage, would not be fair, just and proper. In the light of the fact that the complaint is filed on 24th July 2001 and after issuance of process on 13th September 2001 there is an order of the Lower Appellate Court setting aside ex-parte decree delivered on 28th January 2002, in my view, it will not be fair to pronounce upon the validity of the marriage which took place on 10th February 1997. Since the first respondent alleges fraud on the part of the applicant no.1 in obtaining an ex-parte decree, the effect thereof, in law, on the subsequent marriage needs to be gone into. Whether relationship subsists after the decree of the Trial Court is set aside, is an aspect which the learned Magistrate will also have to go into after judgements and decrees of the Civil Court are placed on record. The Revisional Court was, therefore, right in partly allowing the revision and directing the Magistrate to proceed u/s 494

of IPC.. In this case, the complaint sets out the matrimonial proceedings and yet alleges an offence punishable u/s 494 IPC on the strength of the judgements in civil proceedings. That, there was a Civil Court Decree dismissing the Divorce Petition No.244/1984, on merits and therefore the subsequent ex-parte decree being fradulent, distinguishes this case from the facts of the decision reported in 2002-AllMR (Cri)-SC-912.

11. These aspects have been noticed by both learned Magistrate and the Sessions Judge. Their prima facie conclusion is not vitiated or perverse so as to call for interference in inherent jurisdiction.

12. In the result, Rule Discharged. Interim order to stand vacated forthwith. All observations made by the Trial Court, Revisional Court as well as this Court are prima facie and shall not influence the learned Magistrate while trying the case.

(S.C.DHARMADHIKARI, J.)